Supreme Court, U.S.
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No. 07-897

IN THE

Supreme Court of the United States

LYNN HUST,

Petitioner,

v.

FRANK MARVIN PHILLIPS, JR.,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In this case, both the district court and Ninth Circuit concluded that petitioner Hust—a prison librarian—violated respondent Phillips' right to access the courts, by refusing to let him use the prison comb binder to bind a petition he wished to file in this Court. The district court and Ninth Circuit also concluded that Hust is not entitled to qualified immunity. The Ninth Circuit explained that Hust is liable because, after she denied Phillips' request to use the comb binder, Phillips failed to submit his petition to this Court until the pertinent deadline had passed. In the Ninth Circuit's view, Hust is liable because that result was "foreseeable," even if this Court's rules did not require Phillips' petition to be bound. The Ninth Circuit erred by holding that mere "foreseeability" creates liability, and by requiring no showing that Hust's conduct *caused* Phillips' inability to obtain relief in this Court. In holding that foreseeability alone sufficed, the Ninth Circuit parted ways with other circuits' access-to-courts jurisprudence, it ignored this Court's qualified-immunity jurisprudence, and it significantly expanded prison officials' potential liability in a variety of contexts. Accordingly, this court should grant Hust's petition for the purpose of summarily reversing (or, alternatively, should set the case for briefing and argument).

In response, Phillips asserts that "[t]his case has unnecessarily proceeded all the way to the United States Supreme Court on a false premise." (Response

3, 6). According to Phillips, petitioner Hust has attempted to "deceiv[e]" both this Court and the Ninth Circuit by asserting that the district court concluded that Supreme Court rules *required* comb binding. (Response 3, 6). As Phillips points out, the district court ultimately explained—in denying Hust's motion to reconsider the order deeming her liable—that, in its view, "the applicable United States Supreme Court rule requires *some* form of binding," and it declined to hold "that Rule 33.2 *requires* the comb binding of pro se petitions in general." (Response App. 8; emphasis added).

Yet nothing in Hust's certiorari petition is based on the "false premise" that Phillips refers to. Nothing in Hust's petition suggests that the district court concluded that Supreme Court rules require comb binding. Further, nothing in the Ninth Circuit decision that Hust asks this Court to review suggests that the Ninth Circuit misunderstood the nature of the district court ruling. Indeed, Hust made no effort to mislead the Ninth Circuit about the district court ruling. Finally, and despite Phillips' contentions to the contrary, nothing in the district court order denying Hust's motion to reconsider provides any basis for denying Hust's certiorari petition.

A. Nothing in Hust's certiorari petition suggests that the district court concluded that comb-binding was required.

Hust's certiorari petition notes that the district court ultimately "denied Hust's motion for summary judgment, granted Phillips's motion for summary judgment as to liability on the denial-of-access [to

courts] claim, and denied it as to his other claims." (Petition 5). The petition does not describe the district court's reasoning in making those rulings. It does not purport to identify the manner in which the district court construed this Court's rules. Although the petition argues that the district court should have granted Hust's summary judgment motion, it nowhere suggests that the district court construed the Court's rules as requiring comb-binding.

In short, although Phillips suggests that Hust's petition "endlessly hammers on the legal falsity that comb binding was held to be mandatory" by the district court, nothing in the petition suggests that the district court deemed comb binding "to be mandatory." As a result, Phillips' "false premise" argument is itself based on a false factual premise.

B. Nothing suggests that the Ninth Circuit was "deceived" or "duped" into believing that the district court ruled that comb binding was required.

Although Phillips accuses Hust of "deceiving the courts," and of having "duped" the dissenters in the Ninth Circuit "into believing that [the] District Court . . . had held that comb binding was both mandatory and necessary," nothing supports those assertions. First, nothing in the Ninth Circuit's written decision, or in its order denying Hust's petition for rehearing, suggested that the district court believed that Supreme Court rules require comb binding. (Petition, App. 2-26). Second, neither Judge O'Scannlain's dissent (to the decision affirming the district court judgment) nor Judge Kozinski's dissent (to the order

denying the petition for rehearing) reflects a belief that the district court had deemed comb binding "mandatory." (Petition, App. 3, 26-40). Nothing suggests that either the majority or the dissenters had been "duped" about the nature of the district court ruling.

C. In urging the Ninth Circuit to reverse, Hust accurately described the judgment that the district court entered, and she accurately explained why the order denying her motion to reconsider was immaterial.

Phillips does accurately describe one aspect of Hust's Ninth Circuit briefing: In Hust's appellant's brief in the Ninth Circuit, she did state that "the premise for the district court's ruling" was its conclusion "that the Supreme Court's rules require comb binding." (Supp. App. 5, Appellant's Brief 17). Hust made no reference—in that particular brief—to the district court order denying her motion to reconsider, or to the district court's clarification that, in its view, Supreme Court rules merely required "some" form of binding. Yet Hust's brief accurately described the judgment that the district court ultimately had entered, and it did not attempt to somehow deceive the Ninth Circuit.

Hust's appellant's brief asked the Ninth Circuit to reverse the district court judgment. That judgment did appear to reflect a belief by the district court that Supreme Court rules required Phillips' petition to be comb bound. The district court judgment—dated September 29, 2004—stated that it was "[b]ased on the Opinion and Order (#49) dated March 31, 2003."

(Petition, App. 82). In turn, the March 31, 2003 Opinion and Order suggested that Supreme Court Rule 33 required Phillips to comb bind his petition. (*See* Petition, App. 74, March 2003 Opinion and Order, referring to Hust's "refusal to comb bind [Phillips'] materials in accordance with the Supreme Court's Rule 33"). As a result, Hust's appellant's brief in the Ninth Circuit accurately described the premise of the district court judgment as its belief that "the Supreme Court's rules require comb binding."

And while the district court had retreated from that premise in the February 9, 2004 order that denied Hust's motion to reconsider, the judgment that it entered in September 2004 made no reference to that order.[1] As a result, Hust's appellant's brief in the Ninth Circuit appropriately addressed the reasoning that the district court articulated in its March 2003 Opinion and Order, and it appropriately made no ref-

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[1] The judgment stated that it also was "[b]ased on" the districts court's Findings of Fact and Conclusions of Law dated September 29, 2004. (Petition, App. 82). But the September 29, 2004 Findings of Fact and Conclusions of Law themselves incorporated the March 31, 2003 order, and made no reference to the order denying Hust's motion to reconsider. (*See* Petition, App. 78, September 29, 2004 Findings and Conclusions, stating that "[t]he court's factual findings are set out in detail in the court's Opinion and Order (#49)" dated March 31, 2003).

erence to the order denying Hust's motion to reconsider.

In Phillips' appellee's brief, he urged the Ninth Circuit to examine the district court order denying Hust's motion to reconsider. He argued that the order—by clarifying that Supreme Court rules required "*some* form of binding," and by declining to conclude that they required comb binding—somehow undermined Hust's appeal. But as Hust's reply brief in the Ninth Circuit accurately explained, whether the district court had concluded that Supreme Court rules required comb binding simply could not affect the basis for her appeal: "Defendant does not view the order on reconsideration as containing any material change." (Supp. App. 11, Reply Brief 5 n. 2). Although the district court "purported to abandon its earlier clear ruling that the Supreme Court's rules require comb binding, the district court ultimately stated that comb binding was the 'necessary alternative to stapling [Phillips'] petition," and it thus

> adhered to its [earlier] ruling that, under the circumstances of this case, [Hust]'s temporary refusal to comb-bind plaintiff's petition prevented plaintiff from filing a timely petition in compliance with the Supreme Court's rules. [Hust] fully addressed and refuted that notion in her opening brief.

(Supp. App. 12-13, Reply Brief 5 n. 2).

In Hust's view, Supreme Court rules permitted Phillips to submit an unbound petition, and refusal to let him use the prison comb binder could not have

prevented him from filing a timely certiorari petition or from otherwise exercising his right to access the courts. Whether the district court had concluded that comb binding was required, or whether it concluded only that *some* binding was required, Hust's legal position would remain the same: Under the circumstances presented, Hust could not have committed a constitutional violation by refusing to let Phillips use the prison comb binder.

In the end, both parties—while in the Ninth Circuit—expressly addressed the significance of the district court order denying Hust's motion to reconsider. More particularly, Hust's briefing in the Ninth Court accurately informed the court that the legal issues presented by the district court judgment were not somehow altered by the order denying her motion to reconsider. Any suggestion that Hust attempted to "deceive" or "dupe" the Ninth Circuit is at odds with the record.

D. The district court order denying Hust's motion to reconsider did not "destroy[] her case."

Phillips asserts that the district court's clarification on reconsideration "destroys [Hust's] case," and that Hust's "concerns raised in this Court as well as those raised in the 9th Circuit . . . were asked, answered, and disposed of" by the order denying the motion to reconsider. (Response 9, 1). For essentially the same reasons discussed already, Phillips is mistaken.

Whether the district court based its judgment on a conclusion that comb binding was required or, alter-

natively, on a conclusion that *some* form of binding was required, is immaterial. That is, regardless of the conclusion that the district court reached on that particular issue, the Ninth Circuit decision that Hust asks this court to review remains unchanged. The Ninth Circuit held that, although this Court's rules are "less than clear as to whether some form of binding [was] required in the circumstances presented in this case," Hust nonetheless violated Phillips' access-to-court rights by refusing to let him use the prison comb binder. (Petition, App. 16-17). The manner in which the district court resolved Hust's motion to reconsider does not somehow diminish the significance of the Ninth Circuit's holding, or somehow undermine Hust's argument that the Ninth Circuit committed legal error. Nothing about the order denying the motion to reconsider suggests a basis for denying Hust's certiorari petition, or for affirming the Ninth Circuit.

Phillips has identified no other basis—aside from the arguments discussed above—for denying Hust's certiorari petition, or for affirming the Ninth Circuit's decision. For the reasons that Hust recounted in her petition, the Ninth Circuit's decision warrants review and reversal.

CONCLUSION

This Court should grant the petition for certiorari and summarily reverse. Alternatively, the Court should grant the petition and set the case for briefing and argument.

Respectfully submitted,
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July 7, 2008

APPENDIX

No. 04-36021

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK MARVIN PHILLIPS, JR.,

Plaintiff-Appellee,

v.

LYNN HUST,

Defendant-Appellant.

APPELLANT'S BRIEF

Appeal from the United States District Court
for the District of Oregon

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B. On the undisputed facts, defendant did not violate plaintiff's right of access to the courts.

In *Lewis v. Casey*, 518 U.S. 343 (1996), the Court explained the constitutional right of access to the courts recognized in *Bounds v. Smith*, 430 U.S. 817 (1977). The *Lewis* Court explained that the constitutional purpose of the right of access to the courts is to ensure "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." 518 U.S. at 351 (quoting *Bounds*, 430 U.S. at 825). The *Lewis* Court held that to prove a denial of access to the courts, an inmate must prove that prison deficiencies

> hindered his efforts to pursue a legal claim. He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.

Lewis, 518 U.S. at 351.

The *Lewis* Court noted that certain statements in *Bounds* had suggested "that the State must enable the prisoner to *discover* grievances, and to *litigate effectively* once in court." *Lewis*, 518 U.S. at 354

(emphasis in original). In *Lewis*, the Court expressly disclaimed those suggestions. *Id.*

The *Lewis* Court also stressed the limited types of cases covered by the right of access to the courts. Direct appeals from criminal convictions are included (*Lewis*, 518 U.S. at 354), as are "'civil rights actions' — *i.e.*, actions under 42 U.S.C. § 1983 to vindicate 'basic constitutional rights.'" *Id.* (quoting *Bounds*, 418 U.S. at 579). The *Lewis* Court summarized:

> In other words, *Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.

Lewis, 518 U.S. at 355 (emphasis in original).

Finally, the *Lewis* Court identified what an inmate must prove to demonstrate a violation of the right of access to the courts:

> When any inmate * * * shows that an actionable claim of this nature [a challenge to sentences or to conditions of confinement] which he desired to bring has been lost or rejected, or that the presentation of such a claim is currently being prevented, because this

> capability of filing suit has not been provided, he demonstrates that the State has failed to furnish [the right of access to the courts].

Id. at 356.

In sum, under *Lewis* an inmate claiming a denial of the right of access to the courts must show actual injury. *Lewis*, 518 U.S. at 349. That requirement is not satisfied by a showing that the inmate was unable to litigate effectively once in court. *Id.* at 354. Rather, the inmate must show that an arguably actionable claim (that is, a nonfrivolous legal claim, *id.* at 353) challenging a sentence or conditions of confinement was lost or currently is being prevented because state prison officials have failed to provide the "capability of filing suit." *Id.* at 356

On the undisputed facts, it is clear that defendant did not prevent plaintiff from filing a nonfrivolous claim in the Supreme Court.

The district court's contrary ruling rests on the court's belief that the Supreme Court's rules require petitions for certiorari submitted *in forma pauperis* to be comb bound. *See* C.R. 49 at 29-30; E.R. 96-97. It was on that basis that the district court concluded that, in denying plaintiff's request for comb binding, defendant's

> actions caused him to face the difficult choice of violating a Supreme Court Rule by submitting a partially bound brief, or missing his deadline. Plaintiff chose to comply with the Supreme Court Rule, and missed the filing deadline; his petition was subsequently denied as untimely by

> the Supreme Court. Viewing the facts in a light most favorable to plaintiff, it appears from the factual allegations and from the record on summary judgment that defendant violated plaintiff's constitutional right to access the courts.

C.R. 49 at 30-31; E.R. 97-98 (citations omitted); *see* C.R. 49 at 32-33; E.R. 99-100 ("comb binding * * * was essential to plaintiff's filing"; "to deny * * * comb binding to an inmate plaintiff, so as to render him incapable of substantially complying with an applicable Supreme Court Rule").

A review of the controlling Supreme Court rules shows that the premise for the district court's ruling — that the Supreme Court's rules require comb binding — is simply wrong. Accordingly, there is no legal basis for the district court's decision.

Under Supreme Court Rule 39.1 and 39.2,[2] a person such as plaintiff seeking to proceed *in forma pauperis* for the purpose of filing a document must file a motion for leave to do so, together with the document. Rule 39.3 prescribes the form in which the document must be submitted:

> Except when these Rules expressly provide that a document shall be prepared as required by Rule 33.1, every document presented by a party proceeding under this Rule shall be prepared as required by Rule 33.2 *(unless such*

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[2] For the court's convenience, the Supreme Court rules cited in this brief are included in an addendum to this brief.

> *preparation is impossible).* Every document shall be legible. While making due allowance for any case presented under this Rule by a person appearing *pro se*, the Clerk will not file any document if it does not comply with the substance of these Rules or is jurisdictionally out of time.

(Emphasis added.) No rule expressly required plaintiff's petition for certiorari to "be prepared as required by Rule 33.1." Therefore, the petition had to be prepared in the form required by Rule 33.2 "unless such preparation [was] impossible." Rule 39.3. The rule expressly directs the Court Clerk to "mak[e] due allowance for any case presented under this Rule by a person appearing *pro se*." *Id.*

Rule 33.2(a) sets forth the relevant requirements, as follows:

> 2. *8 ½ - by 11-Inch Paper Format:* (a) The text of every document, including any appendix thereto, expressly permitted by these Rules to be presented to the Court on 8 ½ - by 11-inch paper shall appear double-spaced, on opaque, unglazed, white paper. The document shall be stapled or bound *at the upper left-hand corner.*
> * * *

(Emphasis added.)

The final quoted sentence from Rule 33.2(a) shows unambiguously that comb binding is not required. A document must be stapled or bound "at the upper left-hand corner." *Id.* That language does not permit, much less require, comb binding; comb binding results in a document bound along the entire left-hand

border rather than merely the "upper left-hand corner." Thus, a comb-bound document would violate Rule 33.2(a).

Further, the "impossibility" exception in Rule 39.3 completely excused plaintiff from the Rule 33.2(a) binding requirement. As plaintiff argued below and as the district court found, his petition was too thick to bind at the upper left-hand corner using a staple. Because the "preparation" required by Rule 33.2 was "impossible" (Rule 39.3), plaintiff was free to submit the petition to the Supreme Court unbound.

This point is bolstered by the portion of Rule 39.3 directing the Court Clerk to "mak[e] due allowance for any case presented under this Rule by a person appearing *pro se*." That provision shows clearly that the Court disregards technical and nonsubstantive imperfections — such as those involving binding — in documents timely submitted by *pro se* litigants.

Consequently, in denying plaintiff's request for comb binding, defendant did not prevent plaintiff from filing a petition for certiorari in compliance with the Court's rules. The untimely filing resulted from plaintiff's own error in believing that comb binding was required, and in waiting beyond the filing deadline before submitting his petition to the Court.

No. 04-36021

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANK MARVIN PHILLIPS, JR.,

Plaintiff-Appellee,

v.

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Defendant-Appellant.

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

INTRODUCTION

Pursuant to Fed. R. App. P. 28(c), defendant-appellant submits this reply brief to address assertions in plaintiff's Brief of Appellee.[1]

I. Defendant did not violate plaintiff's right of access to the courts.

A. Under the facts presented, the Supreme Court's rules did not require plaintiff's petition for certiorari to be bound.

Plaintiff begins by arguing that the relevant Supreme Court rules required his brief to be bound in some fashion in order to be accepted. That argument simply ignores the dispositive provision of Supreme Court Rule 39.3. As explained in defendant's opening brief, briefs submitted to the Supreme Court *in forma pauperis* must comply with the requirements of Rule 33.2 — including the requirement of Rule 33.2(a) that documents be bound "at the upper left-hand corner" — "unless such preparation is impossible." The district court expressly found that plaintiff's petition was too thick to bind at the upper left-hand corner using a staple. C.R. 49 at 29; E.R. 96. Compliance

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[1] Plaintiff's repeated *ad hominem* assaults on defendant, her colleagues, and her counsel, which permeate his brief, are groundless, out of place in an appellate brief, and do not merit a response.

with Rule 33.2 thus was "impossible" in this instance. Accordingly, the Supreme Court rules expressly permitted plaintiff to file his brief unbound.

Plaintiff asserts that through this argument, defendant explains how a prisoner can "evade" Rule 33.2(a) or "be excused" from compliance with the rules. Br. of App. 7. To the contrary, defendant's explanation demonstrates how an unbound brief in these circumstances would have **complied** with the Supreme Court's rules.

In the same vein, plaintiff asserts that defendant suggests that the Oregon Department of Corrections (ODOC) "is not bound by any court rule." Br. of App. 7-8. To the contrary, ODOC acknowledges through its administrative rules and otherwise that it must provide inmates with the opportunity to file necessary documents in compliance with court rules. *See, e.g.*, Or. Admin. R. § 291-139-0005(3) (quoted at App. Br. 30 and ADD-8). Defendant's point is that, as already shown, plaintiff's filing of an unbound brief in these circumstances would have complied with the Supreme Court's rules.

Plaintiff also asserts that the question whether the Supreme Court rules permitted him to file an unbound brief "has no bearing" here. Br. of App. 7. To the contrary, the proper resolution of that question — that an unbound brief from petitioner in these circumstances would have complied with the Supreme Court rules — is absolutely dispositive of this case. Because plaintiff could have complied with the Supreme Court rules by filing his brief unbound, the temporary refusal to comb-bind his brief did not in-

terfere with plaintiff's ability to file that brief. Therefore, as a matter of law defendant did not violate plaintiff's right of access to the courts.

Next, plaintiff relies on the district court's ruling that access to comb binding was included among the "necessary supplies" that ODOC was required to provide to plaintiff to enable him to file his brief. Br. of App. 8 (quoting C.R. 49 at 32, E.R. 99) (in turn quoting Or. Admin. R. § 291-139-0005(3)). For the reasons explained in detail in defendant's opening brief at pages 17-19, that ruling rested on a clear misreading of Supreme Court Rules 33.2(a) and 39.3. As explained in that brief, Supreme Court Rule 33.2(a) does not even permit, much less require, any brief to be comb bound. Defendant relies on that argument here.

Plaintiff asserts that in its order on reconsideration (C.R. 60, Supp. E.R. 15-25), the district court later abandoned its earlier conclusion that comb binding was required. *See* E.R. 99-100 ("comb binding * * * was essential to plaintiff's filing"; "to deny * * * comb binding to an inmate plaintiff, so as to render him incapable of substantially complying with an applicable Supreme Court Rule"). Instead, the district court purported to recharacterize its ruling as stating only that "the plain language of the applicable U.S. Supreme Court rule requires some form of binding." Supp. E.R. 22. As explained above and in defendant's opening brief, however, that later proposition is refuted by the "impossibility" provision in Supreme Court Rule 39.3 and by the district court's finding that binding plaintiff's brief "at the upper left-hand

corner" (Supreme Court Rule 33.2(a)) — the only form of binding addressed by applicable rules — could not be done because a staple would not have been large enough to accomplish the task.

Plaintiff next relies on the district court's statement, in its order on reconsideration, that "comb binding was shown to be the necessary, available, and reasonable alternative." Br. of App. 10 (quoting Supp. E.R. 22). That argument, and the district court's statement concerning the "necess[ity]" of comb binding, ignore the point that, as pointed out at page 18 of defendant's opening brief, Supreme Court Rule 33.2(a) shows unambiguously that comb binding is not only not required, but not even allowed. The rule calls for binding "at the upper left-hand corner" unless it is "impossible" under Rule 39.3. Because comb binding results in a document bound along the entire left-hand border rather than merely the "upper left-hand corner," the rule does not allow comb binding.[2]

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[2] In his motion for sanctions, plaintiff criticizes defendant for not mentioning, in defendant's opening brief, the district court's order on reconsideration. Defendant does not view the order on reconsideration as containing any material change. In particular, although at one point the district court purported to abandon its earlier clear ruling that the Supreme Court's rules require comb binding, the district court ultimately stated that comb binding was the "necessary" alternative to stapling the petition. Supp. E.R.

Footnote continued...

(...continued)

22. Thus, the district court adhered to its ruling that, under the circumstances of this case, defendant's temporary refusal to comb-bind plaintiff's petition prevented plaintiff from filing a timely petition in compliance with the Supreme Court's rules. Defendant fully addressed and refuted that notion in her opening brief. There is no basis for sanctions here.